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MICHAEL KUDAK, JR., CLERK

In the  
**Supreme Court of the United States**

October Term, 1978

No. **78-235**

PITTSBURGH & NEW ENGLAND TRUCKING CO.,  
211 Washington Avenue, Dravosburg, PA 15034

*Petitioner*

vs.

THE UNITED STATES OF AMERICA AND THE  
INTERSTATE COMMERCE COMMISSION,

*Respondents*

YOURGA TRUCKING, INC.,  
COLONIAL FAST FREIGHT LINES, INC. AND  
COLONIAL REFRIGERATED  
TRANSPORTATION, INC.,

*Intervenors.*

**PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF  
APPEALS FOR THE THIRD CIRCUIT**

JAMES D. PORTERFIELD

Box 4788

Pittsburgh, PA 15206

412-466-0161

*Attorney for Pittsburgh &  
New England Trucking Co.*

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To the Honorable, the Chief Justice and Associate Justices of  
the Supreme Court of the United States:

Pittsburgh & New England Trucking Co., the petitioner  
herein, respectfully prays that a writ of certiorari issue to  
review the Order of the United States Court of Appeals For  
The Third Circuit entered in this matter on May 3, 1978 at  
Docket No. 76-2617.

**OPINIONS BELOW**

By Order dated May 3, 1978, the Court of Appeals, the  
Order the propriety of which is herein sought to be reviewed

*Jurisdiction, Question Presented &  
Constitution and Statutory Provisions Involved*

and which is printed in Appendix A hereto, infra, page 14, granted the motion of the Interstate Commerce Commission, respondent below, to dismiss petitioner's Petition For Review for failure to exhaust administrative remedies.

### **JURISDICTION**

The jurisdiction of this Court is invoked pursuant to 28 USC §1254 (1).

### **QUESTION PRESENTED**

Whether an interstate common motor carrier which has made a good faith effort to comply with confusing and complex regulations of the Interstate Commerce Commission is required to petition the Interstate Commerce Commission for reconsideration of its decision, by an Order, to reject summarily an application for gateway eliminations containing one hundred and fifty-one distinct parts, before the motor carrier may seek review of such decision in a court of the United States.

### **CONSTITUTION AND STATUTORY PROVISIONS INVOLVED**

This case involves the Fifth Amendment to the Constitution of the United States, which provides as follows:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

This case also involves Section 704 of the Administrative Procedure Act (5 U.S.C. 704), which provides as follows:

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

### **STATEMENT OF THE CASE**

This petition for a writ of certiorari to the United States Court of Appeals For The Third Circuit is brought in order to require the court below to review on the merits, the petition brought in that court for review of an order of the Interstate Commerce Commission.

Petitioner is authorized by the Interstate Commerce Commission to transport general commodities, with certain exceptions, and specifically named commodities, over regular and irregular routes, between various points in the United States pursuant to certificates of public convenience and necessity issued by the Commission under the provisions of the Interstate Commerce Act at Docket No. MC-113974 and various sub-numbers thereto.

The Interstate Commerce Commission proposed by regulations which became effective on April 5, 1974 to conserve motor fuels and improve the quality of the environment. These regulations (49 C.F.R. §1065) permitted

common motor carriers of property holding irregular route certificates to eliminate gateways. A gateway in this context means a geographical point to which and from which a motor carrier may provide transportation service for a particular commodity under two or more separate grants of operating authority.

The requirement for motor carriers to physically transport a commodity through a gateway service point if it desired to provide maximum service to regular customers almost invariably resulted in increasing the highway miles between two service points thereby causing operating inefficiencies for motor carrier, unnecessarily increasing the consumption of valuable motor fuels and endangering the public safety with unnecessary pollutants and highway congestion.

The gateway elimination regulations provided two procedures for eliminating gateways: (a) where the direct highway distance between the points to be served was not less than eighty percent of the highway distance between such points over the carrier's authorized routing through the gateway, the carrier submitted to the Commission a letter notice which was then published in the *Federal Register*; and if no protests were filed within ten days of the publication of the notice, the elimination of the gateway would be granted; (b) where the direct highway distance between the points to be served was less than eighty percent of the highway distance between such points over the carrier's authorized routing through the gateway, the carrier submitted a Commission prescribed application OP-OR-9 along with other evidence including evidence of services performed. (Hereinafter the procedure designated (a) above will be referred to as the "20% rule procedure" or the "letter-notice procedure" and the procedure designated (b) above will be referred to as the "OP-OR-9 application procedure".) The failure of a carrier to utilize either or both of the above

described procedures foreclosed a carrier (except for a very limited situation described at 49 C.F.R. §1065.1 (b)) from thereafter using gateways which were previously available to or in fact used by a carrier.

The petitioner had fourteen weeks in which to utilize one or both of the above described procedures in order to eliminate its gateways. The enormity and difficulty of the task faced by the petitioner is readily understood when it is realized that petitioner was required to determine all possible gateways involved with its thirty-one grants of irregular route authority which involved 28 different, but overlapping, commodity descriptions and authorized service to, from, or between points in 37 states and the District of Columbia. All compatible commodity descriptions had first to be determined, then a time-consuming analysis made on every possible combination to determine whether the tacking operations were within the 20% Rule. In many cases three and sometimes four grants of authority could be tacked in sequence, resulting in the elimination of two or three separate gateways. Through this trial and error process involving innumerable mathematical calculations the boundaries of the territory within the 20% Rule were determined.

Petitioner filed as many letter-notice applications as possible on June 4, 1974, which was the last day the Commission would accept applications under the letter-notice procedure.

Also on June 4, 1974, petitioner filed its OP-OR-9 application which was assigned Docket No. MC-113974 (Sub No. 50G) by the Commission. To the OP-OR-9 application petitioner attached a Request to Amend And/Or Supplement the Application. That request variously stated, "... the procedures established in the Commission's decision are complex and require a great deal of analysis and

preparatory work before the letter-notices may be properly prepared and filed . . . . Applicant has made a good faith attempt to comply with the letter of the Commission's report. The preparation of complete and accurate letter-notices has occupied applicant's traffic personnel almost exclusively since the issuance of the report. As a result, applicant has not been able to devote sufficient time to adequately analyze its gateway operations with respect to those operations which exceed the 20% formula. Most importantly, it is impossible to formulate the 207 application and prepare all supporting abstract shipments until all letter-notices are completed since there is a direct correlation between the letter-notices and the applications." Petitioner thereafter requested that it be allowed to supplement its application with traffic exhibits and other necessary detailed information subsequent to June 4, 1974.

Subsequent to June 4, 1974 petitioner analyzed its complex operating authority in order to more specifically set forth the scope of authority being requested and compiled voluminous traffic exhibits for the two year period from November 23, 1971 to November 23, 1973 in accordance with the Commission's regulations. The supplemental information was submitted to the Commission which, without publishing the application in the *Federal Register* as required by the regulations, rejected the supporting traffic information and dismissed the application by order served June 3, 1975.

On July 2, 1975 petitioner then filed a petition for reconsideration of the Commission order which was denied by the Commission's order served August 28, 1975. On or about October 2, 1975 petitioner then filed with the Commission a Petition for Stay of the order served August 28, 1975. By order served October 17, 1975 the Commission denied the Petition for Stay.

On or about October 17, 1975 petitioner filed with the Court of Appeals a Motion for Stay, and Petition to Review, Set Aside and Enjoin the Order of the Commission. The proceeding was assigned No. 75-2170. Subsequently, by order served January 15, 1976, the Commission, subject to the approval of the Court of Appeals, reopened the case for acceptance and consideration of any late-filed evidence which was not previously considered by the Commission, and for further processing under the gateway elimination procedure. The proceeding was reopened in accordance with the Commission's General Policy Statement published in the *Federal Register* on January 16, 1976 as a result of the decision in *Squaw Transit Company v. United States*, 402 F. Supp. 1278 (N.D. Okla. 1975).

The Court of Appeals granted a motion to remand the proceeding to the Commission on February 23, 1976.

The 151 part application was subsequently published in the *Federal Register* on April 28, 1976. Several protests were filed to the application including protests by the intervenors.

By order served October 13, 1976 the Commission by Review Board No. 1 again completely denied the application without giving consideration to each individual part. The Commission's Order is printed in Appendix B, hereto, *infra*, pages 15-18.

On or about December 14, 1976 petitioner filed with the Court of Appeals a Motion for Stay of the Commission's Order, and Petition to Review, Set Aside and Enjoin the Commission's Order. On or about December 17, 1976 the Commission filed a motion with the Court of Appeals to dismiss the Petition for Review.

By order dated December 22, 1976 the Court of Appeals granted petitioner's motion to stay the effect of the order of the Commission served October 13, 1976. Also by order dated December 22, 1976 the Court of Appeals referred the

Commission's motion to dismiss the petition for review to a merits panel for disposition.

On April 27, 1978, the Court of Appeals for the Third Circuit heard oral argument by the petitioner, respondent and intervenors and, then, by Order, dated May 3, 1978, it granted the motion by the Respondent, Interstate Commerce Commission, to dismiss petitioner's Petition For Review for failure to exhaust administrative remedies.

### REASONS FOR GRANTING THE WRIT

Special and important reasons exist for this Court to grant the petition for a writ of certiorari. The Court of Appeals for the Third Circuit improperly granted the Interstate Commerce Commission's motion for dismissal of the petitioner's Petition For Review for failure by the petitioner to exhaust its administrative remedies. In so doing, the Court of Appeals improperly applied proper criteria for requiring the exhaustion of administrative remedies and by so doing, permitted the Interstate Commerce Commission to deny to the petitioner its Fifth Amendment right to due process and permitted the Commission to exercise its statutory authority in an arbitrary, capricious and unreasonable manner, all to the detriment of the petitioner.

The Commission to some extent recognized the difficulty the carriers were having in complying with its strict filing time limits and expressly permitted, by an order dated April 4, 1974, carriers to include in their OP-OR-9 applications, applications for the elimination of gateways which otherwise qualified for elimination under the near automatic letter notice procedure. All or part of one hundred and eleven of the one hundred and fifty-one parts of the petitioner's OP-OR-9 application qualified for treatment under the letter notice procedure, but were included in the OP-OR-9 application because of time and manpower problems. The Commission should have required nothing

more of the petitioner with respect to those parts of its OP-OR-9 application which qualified for treatment under the letter notice procedure. Notwithstanding this, the Commission summarily denied and dismissed petitioner's OP-OR-9 application and by so doing, the Commission arbitrarily, capriciously and unreasonably abused its statutory authority.

The Commission's final order (Appendix B, hereof, pages 15-18) clearly reflects that consideration was not given to each part of petitioner's OP-OR-9 application. Petitioner could have filed one hundred and fifty-one OP-OR-9 applications but chose for both its and the Commission's convenience to consolidate all of the gateways it sought to eliminate in a single application. That the Commission did not find that a single part of petitioner's application had merit and that only a select few of the parts were referenced in the Commission's order should have been prima facie evidence to the Court of Appeals that the Commission had abused its statutory authority and denied to the petitioner its Fifth Amendment right to procedural and substantive due process of law.

The Commission has attempted to wrongfully deprive the petitioner of operating authority which it held before June 4, 1974 and the Court of Appeals has improperly granted the Commission's motion for dismissal of the petitioner's Petition for Review for the petitioner's failure to exhaust its administrative remedies.

The purposes for the exhaustion of administrative remedies doctrine is to allow the administrative agency to perform functions within its special competence, to make a factual record, to apply its expertise and to correct its own errors. Not one of these purposes is satisfied in this instance. To summarily dismiss and deny the petitioner's application in the manner in which the Commission did so obviously

requires no special competence. The Commission's final order demonstrates that no attempt was made to apply its expertise to the entire application as its legislatively delegated duty requires.

To require the petitioner to re-petition the Commission for reconsideration is to push the exhaustion doctrine beyond reasonable limits. On June 3, 1975, the Commission had before it petitioner's entire application and supporting evidence and denied and dismissed the application by order served June 3, 1975. On July 2, 1975, petitioner filed a petition for reconsideration which was denied by Commission's order served August 28, 1975. As a result of other litigation hereinabove described the Commission did allegedly reconsider the petitioner's application and, again, dismissed and denied the application by Commission's Order served October 13, 1976. The futility and uselessness of requiring the petitioner to again petition the Commission for reconsideration is evident, for if the petitioner had petitioned for reconsideration the same Commission personnel which before had denied reconsideration would have had no new information to consider. The Commission had one opportunity to find and correct any agency error. It is unreasonable to require the petitioner to petition the Commission for re-reconsideration which is what the Court of Appeal's Order says the petitioner failed to do.

Section 704 of the Administrative Procedure Act (5 U.S.C. §704) provides the lawful criteria for judicial review of agency actions. There is no expression in the Interstate Commerce Act (See, 49 U.S.C. §17 (9)) which requires anything more of the petitioner than a petition for reconsideration. Such a petition on the first summary denial of the petitioner's OP-OR-9 application was made and denied. There was no superior agency authority to which the petitioner could address an appeal. Therefore, the Com-

mission's second summary denial of the petitioner's OP-OR-9 application, under Section 704 of the Administrative Procedure Act, was final agency action sufficient to be subject to judicial review.

### CONCLUSION

Wherefore, petitioner respectfully prays that a writ of certiorari be granted.

Respectively Submitted,

.....  
JAMES D. PORTERFIELD

Box 4788

Pittsburgh, PA 15206

(412) 466-0161

*Attorney for Pittsburgh &  
New England Trucking Co.*

United States Court of Appeals  
For the Third Circuit

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No. 76-2617

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PITTSBURGH & NEW ENGLAND TRUCKING CO.,  
211 Washington Avenue,  
Dravosburg, Pa. 15034

*Petitioner*

v.

THE UNITED STATES OF AMERICA and THE  
INTERSTATE COMMERCE COMMISSION,

*Respondents*

YOURGA TRUCKING, INC., a corporation of  
Wheatland, Pennsylvania,  
COLONIAL FAST FREIGHT LINES, INC. and  
COLONIAL REFRIGERATED  
TRANSPORTATION, INC.,

*Intervenors.*

Argued April 27, 1978

PRESENT: SEITZ, *Chief Judge*, ALDISERT, *Circuit Judge*,  
and STERN, *District Judge*.

**ORDER**

The motion by Respondent, Interstate Commerce Commission, to dismiss Petitioner's Petition For Review is granted for failure to exhaust administrative remedies. Costs taxed against petitioner.

By the Court,

...../s/ SEITZ.....

*Chief Judge*

DATED: May 3, 1978

ATTEST:

...../s/ THOMAS F. QUINN.....

*Thomas F. Quinn, Clerk*

**ORDER**

At a Session of the INTERSTATE COMMERCE COMMISSION, Review Board Number 1, held at its office in Washington, D.C., on the 4th day of October, 1976.

**No. MC-113974 (Sub-No. 50G)**

**PITTSBURGH & NEW ENGLAND TRUCKING CO.  
EXTENTION—GATEWAY ELIMINATION  
(Dravosburg, Pa.)**

IT APPEARING, That by application filed June 4, 1974, the above-named applicant, a corporation, seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of the commodities and from and to the points indicated in the Federal Register publication of April 28, 1976;

IT FURTHER APPEARING, That the application has been considered under the Commission's special gateway elimination procedure (49 CFR 1065); that additional material in support of this application was filed on June 18, 1974, April 25, May 4, and May 12, 1975; that by order dated May 27, 1975, this Commission rejected that portion of applicant's evidence which was tendered after the June 4, 1974, deadline specified in the gateway elimination rules (49 CFR 1065.1(d)(2)(iv)), and dismissed the application for the reasons that applicant had failed timely to produce the required evidence in support of the application and that no supplementary evidence was being accepted in these proceedings; that additional supplemental material in support of this application was tendered on June 3, and 4, 1975; that by petition filed July 3, 1975, applicant sought reconsideration of this Commission's order of May 27, 1975, which petition was denied by order of Division 1, Acting as an Appellate Division, on August 20, 1975; that by petition filed October 6, 1975, applicant sought a stay of the order of

Division 1, Acting as an Appellate Division, of August 20, 1975; that by order dated October 15, 1975, applicant's petition for a stay of the Commission's order of August 20, 1975, was denied; that on or about October 17, 1975, a court action was instituted involving the instant application before the United States Court of Appeals for the Third Circuit; that by order dated January 15, 1976, this Commission reopened the record in this proceeding for the acceptance of late-filed evidence and for reconsideration of this application in the light of such evidence; that notice of this application was published in the Federal Register on April 28, 1976; and that protestants Vance Trucking Company, Inc., and Raeford Trucking Company (jointly) and Dallas & Mavis Forwarding Co., Inc., Mercury Motor Express, Inc., Colonial Refrigerated Transportation, Inc., Colonial Fast Freight Lines, Inc., Herriott Trucking Company, Inc., Senn Trucking Company, Freeport Transport, Inc., Hall's Motor Transit Company, Jetco, Inc., and Yourga Trucking, Inc., motor common carriers, have filed verified statements in opposition to the application;

IT FURTHER APPEARING, That upon consideration of the evidence of record we believe that this application should be denied in its entirety; that a significant number of the 151 parts of this application are unsupported by any description of traffic which might have been transported through the pertinent gateways;<sup>1</sup> that in many instances applicant lists the same shipment (identified by freight bill number) to

<sup>1</sup>The following parts of this application are unsupported by any traffic:

(1)-(4), (8), (11), (12), (16)-(19), (25), (31), (36), (37), (39), (40), (44), (50)-(53), (55), (56), (60), (63), (64), (66), (70), (73), (74), (77)-(79), (81), (82), (85), (90), (92), (97), (98), (100)-(104), (106)-(108), (111), and (127)-(142).

support several different parts of this application;<sup>2</sup> that in certain instances applicant fails to include in its requests for authority the restrictions contained in the underlying certificates upon which parts of its application are based;<sup>3</sup> that applicant includes in its traffic abstracts a substantial number of shipments which are not relevant to an application under the gateway elimination rules inasmuch as those shipments were transported prior to the 2-year period specified in the gateway elimination rules (49 CFR

<sup>2</sup>A random sampling of applicant's traffic abstract indicates that the following shipments (described by freight bill number) were described in support of the parts of this application listed below:

Shipment (freight bill number)	Parts of this application in support of which this shipment is described
#263451	(32), (41), (46), (47), (48)
#263452	(32), (41), (46), (47), (48), (49)
#263610	(32), (41), (45), (46), (47), (48)
#263611	(32), (41), (45), (46), (47), (48)
#264244	(5), (6), (10), (28), (41), (45), (46), (54)
#264424	(5), (6), (10), (26), (41), (45), (46), (54)
#264707	(20), (21), (28), (32), (41), (46) (47), (48)
#264893	(5), (6), (10), (41), (46)
#265062	(21), (23), (28), (41), (45), (46), (48)
#265290	(21), (23), (32), (41), (45), (46) (47), (48)
#266173	(26), (28)

This listing is not intended to be exhaustive, nor does it include those shipments listed by protestant Mercury, in its verified statement, which applicant described in support of more than one part of this application.

<sup>3</sup>In particular, parts (58) through (61) of this application do not include a restriction against "service between any two incorporated cities and towns, both of which are served by rail." Because applicant seeks direct authority on the basis of operations conducted by tacking paragraph 9 of its lead certificate with various other authorities it holds, applicant should have included that restriction in any authority it requested in parts (58) through (61) of this application.

1065.1(d)(2)(iii)); that the operations underlying some parts of this application involve such circuitry that we doubt that such operations have ever been conducted;<sup>4</sup> that although applicant has been given ample time within which to prepare and amend this application, it has failed to present credible, useful, or relevant evidence upon which to base an appropriate grant of authority or to describe its past

<sup>4</sup>For example, in part (73) of this application, applicant seeks direct authority to operate from Ohio to points in Arkansas, Indiana, and Kentucky (among other States). In order to conduct such operations, applicant would have been required to operate through gateways at Ashtabula, Ohio, and Philadelphia, Pa. A comparison of direct and gateway mileages involved in operating from Ashtabula to West Memphis, Ark., Richmond, Ind., and Ashland, Ky., highlight the excessive circuitry involved in conducting some of the operations described by applicant.

**Ashtabula-West Memphis:**

Direct Mileage:	772 miles	[Ashtabula-Philadelphia	383 miles
Gateway mileage:	1388 miles	Philadelphia-W. Memphis	1005 miles
Percent circuitry:	180%	Total gateway miles	1388 miles]

**Ashtabula-Richmond:**

Direct mileage:	291 miles	[Ashtabula-Philadelphia	383 miles
Gateway mileage:	950 miles	Philadelphia-Richmond	519 miles
Percent circuitry:	326%	Total gateway miles	950 miles]

**Ashtabula-Ashland:**

Direct mileage:	309 miles	[Ashtabula-Philadelphia	383 miles
Gateway mileage:	902 miles	Philadelphia-Ashland	519 miles
Percent circuitry:	291%	Total gateway mileage	902 miles]

Other examples abound. In part (124) of this application, applicant seeks direct authority to operate between points in Massachusetts, on the one hand, and, on the other, points in New Hampshire and Vermont. Such operations would have had to be conducted through a point in Connecticut within 35 miles of Columbus Circle, N.Y. In part (144) applicant seeks authority to transport described commodities between points in New Jersey, ~~on the one hand~~, and, on the other, points in Pennsylvania. These operations would have had to be conducted through gateways at Lawrence or North Andover, Mass. In part (149) of the application, applicant seeks direct authority to operate from points in New Jersey within 35 miles of Columbus Circle, N. Y., to points in Maine, New Hampshire and Vermont. These operations would have had to be conducted through a gateway in western Pennsylvania.

operations in such a way as to make possible a determination of the extent to which it is a substantial or effective competitor for the traffic it attempts to describe; that it is not our function to prepare an applicant's presentation or to eliminate the irrelevant material from that presentation; and that we will, therefore, deny this application insofar as applicant seeks direct authority on the basis of past operations through the described gateways;

AND IT FURTHER APPEARING, That Weirton Steel Division, National Steel Corporation, supports this application insofar as applicant seeks authority to transport various metal products from Weirton, W. Va., to points in Virginia and to the District of Columbia; that Weirton states that between 1972 and 1974 it required transportation of nearly 1,500 shipments aggregating 32,000 tons to the District of Columbia and to "points scattered throughout Virginia"; that shipper generally complains that "half" of the available carriers are certified to serve only a portion of "the many destinations located in Virginia", and asserts that the fact that not all vehicles operated by these carriers are properly licensed increases the difficulty of making prompt deliveries to customers; that Weirton's evidence fails to establish a public need for the additional motor authority described in its verified statement; that this shipper does not describe the extent (if any) to which it has used applicant's services for the transportation of shipments from Weirton to points in Virginia and the District of Columbia, nor does it list the carriers whose services it generally uses (including that half of those carriers it now uses who are, by implication, authorized to serve all Virginia points and whose vehicles are properly licensed for that purpose); and that because such ambiguous evidence as Weirton presents cannot possibly form the basis for a grant of authority, this application will be denied.

Wherefore, and good cause appearing therefor:

WE FIND, That applicant has failed to establish that the present or future public convenience and necessity require the proposed operation; that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969; and that the application should be denied.

IT IS ORDERED, That said application be, and it is hereby, denied.

By the Commission, Review Board Number 1,  
Members Carleton, Joyce, and Jones.

ROBERT L. OSWALD,  
*Secretary*

(SEAL)